

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

UNITED STATES OF AMERICA

v.

JAMES BARRETT,

Defendant

Criminal No. 77-15-P-C

Civil No. 90-155-P-C

Misc. No. 96-108-P-C

Court of Appeals No. 96-2355

GENE CARTER, District Judge

**MEMORANDUM OF DECISION AND ORDER
GRANTING A CERTIFICATE OF APPEALABILITY**

Before the Court for action is Petitioner's Notice of Appeal, filed on November 15, 1996 (Supplemental Docket No. 4), which, on instructions of the Court of Appeals entered on December 22, 1997, is to be treated by this Court "as a request to the district court for a certificate of appealability" [pursuant to 28 U.S.C. § 2253] (emphasis in original). Order of Court (Supplemental Docket No. 7 in Misc. No. 96-108-P-C). The Court is instructed "to determine whether the certificate should issue." *Id.*

By specific provision of the applicable statute, "a certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2) (emphasis added). The Court granting a certificate "shall indicate which specific issue or issues satisfy," the foregoing requirement. 28 U.S.C. § 2253(c)(3).

The immediate past procedural history of this matter which gives rise to the pending Notice of Appeal by Petitioner is as follows. Petitioner filed on September 5, 1996, a motion to set aside a judgment of conviction and for such other and further relief as the Court may deem appropriate, which was accompanied by a Motion for Leave to Continue Proceeding *In Forma Pauperis* and a Motion for Appointment of Counsel. (Supplemental Docket No. 1). The motion

was, within the meaning of 28 U.S.C. § 2255, "a second or successive motion" since Petitioner had filed a previous motion under section 2255 to vacate, set aside, or otherwise correct the sentence imposed in the underlying criminal proceeding. The Magistrate Judge considered the matter and entered the following procedural order:

It appearing from the records of this court that the defendant has previously filed one or more motions under 28 U.S.C. § 2255 to vacate, set aside, or correct the sentence that is the subject of the instant motion, the defendant must move in the United States Court of Appeals for the First Circuit in Boston, Massachusetts for an order authorizing this court to consider the instant motion before the same may be accepted for filing. Because no such order has issued, it is **ORDERED** that the instant motion be returned to the defendant forthwith. 28 U.S.C. § 2255, as amended by section 105 of the Antiterrorism and Effective Death Penalty Act of 1996.

Supplemental Docket No. 1.¹ The record reflects that Petitioner had not obtained from the Court of Appeals, prior to filing the present petition, the requisite order of that court.

Petitioner filed his Motion to Review Magistrate's Order & for Writ of Mandamus or Prohibition, entered on October 2, 1996 (Supplemental Docket No. 3), which was acted on by the Court by endorsement on September 16, 1996, the endorsement reading: "The motion to review the Magistrate Judge's order of September 8, 1996 is hereby **GRANTED** and on such review said order is hereby **AFFIRMED** and the motion for a writ of mandamus or prohibition is hereby **DENIED**." Thereafter, on November 15, 1996, Petitioner filed a notice of appeal from that order and a separate endorsement on Petitioner's motion for recusal or disqualification of this judge as the presiding judge (Supplemental Docket No. 4). The matter then resided within the jurisdiction of the Court of Appeals until the entry of that court's order of October 14, 1997 (Docket No. 5), sending the matter back to this Court, asking this Court to act on the notice of appeal as a

¹That Order was entered citing a provision of 28 U.S.C. § 2255. The cited provision refers to 28 U.S.C. § 2244(b)(3)(A), which reads as follows: "Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application."

certificate of appealability.²

As noted above, in order to grant a certificate of appealability, the Court must find that the defendant has made a substantial showing of a denial of a federal constitutional right. *Cox v. Norris*, 133 F.3d 565, 569 (8th Cir. 1997) (citing *Tiedeman v. Benson*, 122 F.3d 518, 522 (8th Cir. 1997)). This requires a determination under the standard set out in *Barefoot v. Estelle*, 463 U.S. 880 (1983), that the petitioner has demonstrated [that] the issues raised are (1) debatable among jurists of reason, (2) a court could resolve the issues differently, or (3) the questions presented are deserving of further proceedings. *Id.* at 893 fn 4.

Here, Petitioner seeks to generate three distinct issues on appeal:

- (1) whether his petition for recusal was improperly denied;
- (2) whether the order affirming the Magistrate Judge's order of September 18, 1996, was in error; and
- (3) whether the application of the pertinent provisions of the Antiterrorism and Effective Death Penalty Act of 1996 (hereinafter "AEDPA") by the Magistrate Judge to Petitioner's filing is in constitutionally impermissible conflict with 28 U.S.C. § 1651, the so-called All Writs Act, authorizing this Court to grant Writs of Error *Coram Nobis*.³

The first issue, that having to do with the propriety of the denial of Petitioner's Motion for Recusal, is easily disposed of because the action of the Court on the motion for recusal does not directly implicate any federal constitutional right of Petitioner. A certificate of appealability as to that issue will be denied.

²The matter was delayed as a result of this Court's request for further clarification and instruction concerning the propriety of its directed role under 28 U.S.C. § 2253 (Docket No. 6). This resulted in the Order of the Court of Appeals entered December 17, 1997, setting out the directions under which the Court now acts (Docket No. 7).

³The latter issue was not raised before the Magistrate Judge and was not addressed by him. It is generated for the first time herein by Petitioner's Motion to Review Magistrate's Order & for Writ of Mandamus or Prohibition (Supplemental Docket No. 3), ¶ 3 at 3.

As to the second issue, the certificate will likewise be denied because 28 U.S.C. § 2255, as amended by section 105 of the AEDPA, clearly and unmistakably bars, as the Magistrate Judge held, the filing of the petition herein absent an order of the United States Court of Appeals for this circuit authorizing this Court to consider the petition. There can be no doubt but that such is the clear intent of the provision. That conclusion is not debatable among jurists of reason, and it is not an issue which different courts could resolve differently.

The third issue, relative to the conflict between the AEDPA and the All Writs Act, is one of potentially constitutional magnitude in that the resolution of the issue may impact Petitioner's federal constitutional right to due process of law and equal protection of the laws.⁴ All things considered, this issue is one on which reasonable jurists could reach conflicting opinions. This Court concludes that the Congress has clear authority to amend the All Writs Act and that it has undertaken to do so by implication in enacting the pertinent provision of the AEDPA to require, as the Magistrate Judge held, that the present petition, in the circumstances of this case, is barred from filing for the reasons asserted by the Magistrate Judge in his Order of September 18, 1996. It is not a conclusion free from doubt, however. For that reason, a certificate of appealability will be granted to Petitioner on that issue.

So ORDERED.

GENE CARTER
District Judge

Dated at Portland, Maine this 16th day of March, 1998.

⁴See *Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976) (right to equal protection of the laws, though not coextensive with equal protection under the Fourteenth Amendment, is encompassed within the substantive content of the Fifth Amendment as to federal actions).